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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

DANIEL A. GRIPPE,

Petitioner,

against

LOUIS J. FRANK, Commissioner of Police, Police Department, County of Nassau, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Opinion Below (There were no opinions delivered in the Courts below)	
Jurisdiction	1
Questions Presented	3
Citation of the Constitutional Provisions, Statutes, and Regulations Involved (their texts are set forth in the Appendix)	5
Statement	6
Argument	11
Conclusion	20
Appendix A—The Constitutional Provisions, Statutes, and Regulations Involved	1a
Appendix B—Charges and Specifications	9a
Appendix C—Orders of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department	11a
Appendix D—Orders of the New York State Court of Appeals	13a

Cases Cited

Barber v. *Page*, 390 US 719	12
Connally v. *General Construction Co.*, 269 US 385	18

PAGE

Davis v. *Alaska*, 415 US 308 12

Eisenstadt v. *Baird*, 405 US 438 16

Escobedo v. *Illinois*, 378 US 478 13

Gardner v. *Broderick*, 392 US 273 .....13, 15

Goldberg v. *Kelly*, 397 US 254 11

Gosa v. *Mayden*, 413 US 665 17

Grayned v. *City of Rockford*, 408 US 104 18

Greene v. *McElroy*, 360 US 474 11

Groban, 352 US 330 13

Kent v. *Dulles*, 357 US 116 16

Lanzetta v. *New Jersey*, 306 US 451 18

Lefkowitz v. *Turley*, 414 US 70 .....13, 14

Miranda v. *Arizona*, 384 US 436 ..... 9, 13

O'Callahan v. *Parker*, 395 US 258 .....16, 17

Olmstead v. *United States*, 277 US 438 16

Papachristou v. *City of Jacksonville*, 405 US 156 18

Parker v. *Levy*, 417 US 733 .....18, 19

Pointer v. *Texas*, 380 US 400 12

Roe v. *Wade*, 410 US 113 16

Sanitation Men's Association v. *Commissioner*, 392 US 280 14

United States v. *Cardiff*, 344 US 174 18

Statutes and Rules:

Supreme Court of the United States Rule 19 1

PAGE

Nassau County Administrative Code

Section 8-22.0 12

Penal Law of the State of New York

Section 255.17 13

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Jurisdiction

The grounds on which the jurisdiction of this Court is sought are set forth in Rule 19(a) of this Court. The Court of Appeals of the State of New York decided that the petitioner in a trial before an administrative tribunal was not deprived of due process and a fair hearing even though he was deprived of the foregoing constitutional rights:

(1) The petitioner had no opportunity to confront his only accusor who wished to recant, change and withdraw the charges she made against the petitioner. The hearsay testimony of this scorned woman was admitted against the petitioner and only the allegations she made in an original conversation were received in evidence, not her recanted version of what transpired.

(2) The petitioner was wholly deprived of his right to counsel at the investigatory stage of the proceedings where he was the target of a criminal investigation. The petitioner should have been charged with the crime of adultery under the Penal Law of the State of New York if he was to be charged with anything under the mandate of New York statute, and hence the petitioner was entitled to counsel.

(3) A confession (called a report) was coerced and forced from the petitioner, and thereafter introduced into evidence.

All of the foregoing constitutional deprivations were duly objected to by petitioner's counsel at all stages of the proceedings below. The Court of Appeals of the State of New York ruled that these clear, uncontradicted and conceded violations of the constitutional rights of the petitioner were insufficient in and of themselves to allow the petitioner to either appeal to the State's highest court on direct constitutional grounds or to permit the petitioner to appeal to said court on a permission basis.

The Court of Appeals of the State of New York in two separate orders dated February 12, 1974, denied (1) the right of the petitioner to appeal on the grounds that constitutional questions were not directly involved and (2) denied petitioner's application for permission to appeal. The Court of Appeals of the State of New York by order dated June 16, 1975, denied re-argument of its aforesaid two orders.

It is respectfully submitted that the determinations of the Court of Appeals of the State of New York as outlined above are not in accordance with the applicable decisions of this Court, and that this Court will reverse the said determination of the Court of Appeals on any one of these constitutional deprivations or upon all of them. It was claimed in the courts below that there was some

residue of so-called legal evidence which would support the petitioner's constitutional rights but regardless of this contention the trier of the facts gave great weight to this constitutionally prohibited evidence.

Questions Presented

1. In an administrative hearing, in the nature of a departmental trial wherein the petitioner was a police sergeant with 14 years of service in the Police Department of the County of Nassau is charged with conduct unbecoming an officer in that he allegedly engaged in an extramarital affair with a woman not his wife, while off-duty and in private, can the determination to dismiss the petitioner from the Civil Service employment for said alleged conduct be sustained when the petitioner was totally deprived of his right to confront and cross-examine his only accusor whose original hearsay testimony was freely admitted at the trial when it was thereafter brought out upon cross-examination that this scorned woman admitted that she had lied, that she wished to retract and recant her original statements made to superior officers and that she wished to completely withdraw the charges the next day after making them?

2. Is the denial of the petitioner's right to counsel guaranteed to him by the sixth amendment of the Constitution of the United States at the investigatory stage of the administrative hearing where the petitioner is the target of the investigation a sufficient additional constitutional ground to require a review of the administrative determination which dismissed the petitioner from his Civil Service employment?

3. Coupled with the foregoing constitutional deprivation can the Court of Appeals of the State of New York's failure to review the administrative determination stand

when the administrative tribunal below allowed into evidence a lengthy report or confession of the petitioner which was coerced and forced from him under threat of loss of employment and which related to his alleged relationship with his woman accusor while off-duty?

4. Does the constitution protect the right to privacy of a citizen who is a member of a police department?

(a) From arbitrary and capricious investigations that intrude into the privacy of an employee's personal and private life that have no relationship to his official duties?

(b) Does an administrative tribunal have jurisdiction where the alleged violation of a police department's rules takes place outside the job environment and the police officer is off-duty?

5. Is the enforcement of Rules and Regulations that are so vague and ambiguous as to fail to indicate the proscribed conduct that in fact are used as a "catch-all", a violation of the due process clause of the Fourteenth Amendment?

The Court of Appeals in failing to review the petitioner's conviction in the administrative tribunal on these constitutional grounds impliedly determined that the petitioner was not deprived of a fair administrative hearing and that the violations of these constitutional rights were insufficient in and of themselves to require a review by said Court. It is respectfully submitted that this determination of the Court of Appeals of the State of New York is not in accord with the applicable decisions of this Court. Assuming without conceding that there was in fact a scintilla or residue of legal evidence which would support or tend to support the petitioner's conviction separate and apart from any constitutional consideration the reliance of the Court's below on any such evidence cannot be countenanced by virtue of the flagrant and intentional vio-

lation of the aforesaid constitutional rights of the petitioner. The deprivation of these constitutional rights was objected to at each and every stage of the proceedings below, that is at the investigatory stage, at the actual trial itself, in the petitioner's brief to the Appellate Division of the Supreme Court of the State of New York and finally in the petitioner's application for re-argument to the said Court of Appeals.

Citation of the Constitutional Provisions, Statutes and Regulations Involved (Their texts are set forth in the Appendix)

Constitution of the United States:

Amendment 1
Amendment 4
Amendment 5
Amendment 6
Amendment 14

Constitution of the State of New York:

Article 1, Section 6

The New York State Penal Law:

Section 255.17

The Nassau County Administrative Code:

Section 8-13.0
Section 8-22.0

Rules and Regulations of the Police Department, County of Nassau, New York:

Article IX
Rule 8
Rule 9
Rule 10
Rule 11

Statement

The Court of first instance was an administrative tribunal made up of a hearing officer (a member of the Police Department) appointed by the Commissioner of Police.

The portions of the testimony where the Federal questions were raised are as follows:

That the petitioner requested when he appeared that he would like to have a lawyer present. He directed this question to Chief Redican which request was denied. That there was no question in Inspector DeBeche's mind, that respondent made this request for a lawyer which was denied (p. 196).* Deputy Chief Inspector Redican proceeded to interrogate the respondent (pp. 23-42). That at one point the respondent asked to have a private conversation with Patrolman Cliff Schmidt. That thereafter Chief of District, McConnell entered the room and informed the respondent that he must answer Chief Redican's questions and submit a full and complete report of the entire incident or that he would be suspended from duty. Sergeant Grippe then prepared a lengthy report regarding the affair with Mrs. Jerome. It was a direct order (p. 43).

That at an early stage counsel for the Petitioner objected to the proposed use of the report (confession) on the grounds that it was coerced under the threat of suspension or dismissal; that at the time of his interrogation he could well have been charged with the crime of adultery, yet he was given no warnings; that he asked for counsel which was refused (pp. 26-28). This report was introduced into evidence over these objections (pp. 46-48).

Chief Redican testified as to the conversation he had had with Mrs. Jerome on September 6, 1973 over prior objec-

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* Refers to the page of the transcript of the Departmental trial printed in the Record on Appeal to the Appellate Division, 2nd Department.

tion by the Petitioner's counsel on the basis that this conversation was the rankest form of hearsay, and that the admission of this conversation violates the Petitioner's right to confront this scorned woman under oath, and deprives him of his right to cross examination (pp. 56-57).

Although the Department subpoenaed Mrs. Jerome, she failed to appear. Counsel for the petitioner insisted that the County produce this woman for confrontation and cross examination (p. 76). This request was ignored throughout the hearing except the County Attorney stated that he was going to have this subpoenaed witness cited for contempt sometime (p. 78).

Chief Redican admitted on cross examination that Mrs. Jerome told him on September 7, 1973 that she had lied during the course of her conversation with them on September 6, 1973 (p. 94) and wanted to go no further with her complaint against petitioner. She was sorry that she had possibly jeopardized Sergeant Grippe's job (p. 126). She further informed Chief Redican that she was not going to sign any statement. Chief Tredwell stated, according to Chief Redican, that counsel could not be present at the interrogation of Sergeant Grippe (p. 97). Upon cross examination Chief Redican disclosed that Sergeant Grippe at first refused to answer many questions on the grounds that they were personal and unconnected with police matters (p. 100). That he, Chief Redican, told Sergeant Grippe that he must answer these questions or be subject to charges of insubordination (p. 100). That Sergeant Grippe continued to refuse to answer questions on this basis (p. 100), but Sergeant Grippe answered all questions relating to when he was on duty (pp. 101-102). Chief Redican admitted that in asking these questions of Sergeant Grippe, he knew that these questions would incriminate petitioner (p. 104) and yet if he did not answer these questions Sergeant Grippe would be insubordinate (pp. 104-105). When the Chief of District, Chief McConnell,

entered the room he told Sergeant Grippe, according to Chief Redican, "who the hell do you think you are pulling this bull shit with me" and further, "you answer these god damn questions right now or you will be charged with insubordination and be immediately suspended" (p. 105). Chief Redican stated at this point Sergeant Grippe was in a state of shock (p. 106). That Chief McConnell said "do you hear me Grippe" and "you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (p. 107).

Chief Redican stated in his opinion that Sergeant Grippe made a false official statement when he wrote "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department":

> Paragraph 1 of the petitioner's report dated September 12, 1973 (p. 414):
>
> "The writer, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, was ordered by Chief of District to write this report concerning his personal and private life, a report that Sergeant Grippe believes to be personal in nature and not involving his duties as a police officer with the Police Department, County of Nassau, New York. Sergeant Grippe believes that his Constitutional Rights and liberties as a citizen of the United States of America are being violated along with his Natural Rights as a free man. Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department, and under such circumstances will write this report." (p. 108)

Chief Redican admitted that suspension may have meant a different thing to Sergeant Grippe than it did to him (p. 109). Chief Redican admitted that if Sergeant Grippe

would have substituted the word suspension for dismissal that he would not have made a false statement (p. 109).

Chief Redican admitted that no *Miranda* warnings were given which fact was conceded to by the County Attorney (p. 143). Yet, Chief Redican stated that if a crime has been committed according to the rules and regulations of the Police Department it must be investigated as a criminal matter (p. 146). That in Chief Redican's opinion the matter could be treated as an internal matter or as a crime or both (p. 147). That the District Attorney was never contacted to Chief Redican's personal knowledge (p. 147).

Chief Tredwell stated in his direct testimony that he could not remember that the petitioner requested an attorney (p. 167), but that he had told Patrolman Schmidt (PBA President) that Grippe was not entitled to an attorney (p. 166). Chief Tredwell admitted that he could not determine whether or not this matter was to be handled as a criminal matter; that he was advised by the Second Deputy Commissioner of Police that this would be an internal investigation and that he would not go criminal (p. 171). That the only law enforcement official that has a right to determine whether a person will be prosecuted criminally is the District Attorney and the Grand Jury; that we have not consulted with the District Attorney and it was decided that we would not go criminal (p. 172). Chief Tredwell admitted that he had no authority to advise the petitioner that if he were found guilty he would lose his job (pp. 174-179).

The petitioner, during his interrogation by high ranking officers of the police department and in his coerced confession, complained that his right to privacy was being infringed upon. His repeated refusal to answer questions which were personal and private in nature and had nothing to do with his duties as a police officer, even after Chief Redican threatened to charge the petitioner with insubordination for refusing to answer these certain ques-

tions (pp. 41, 100-101), clearly indicates that the petitioner believed that his right to privacy was being violated. Although the petitioner refused to answer questions that were of a personal nature, he answered all questions that related to his official duties (pp. 101-102).

The police department's lack of jurisdiction was objected to during the administrative hearing by the petitioner's counsel, even at the outset of the hearing (pp. 9-10). The police department knew that it lacked the authority to handle the matter administratively, for only the District Attorney or the Grand Jury can lawfully decide not to prosecute criminally (p. 172). The proper forum should have been to try the matter in a court of law, but the police department has no control over the courts or its judges, and hence most of the department's so-called evidence, if not all, would have been suppressed. A servant becomes a slave when his master insists upon the control of his being outside the job environment. Thus, the servant loses his freedom, and the master becomes a slave owner.

The charge the petitioner was charged with fails to identify any violation of the rules and regulations of the police department, because it fails to point out any conduct or activity by the petitioner which had any relationship with the performance of his duties as a police sergeant. The charge tends to rely upon the Rules and Regulations and the Nassau County Administrative Code, *infra*. The terms, "Conduct unbecoming an officer", and "Prejudicial to the good order and efficiency of the Police Department", are vague and ambiguous. Firstly, what do these terms mean; and secondly, how can a man that is off-duty and out of uniform, allegedly engaging in conduct bearing no relationship to police duties, affect the efficiency of the police department or be unbecoming an officer? If the man committed a crime, and was lawfully convicted of such crime in a court of law, then and only then might the administrative agency take cognizance of off-duty activities, but this is not so in the case at bar.

The petitioner thereafter argued in his Brief to the Appellate Division, Second Department and in the Court of Appeals that the petitioner had been deprived of the most essential element of due process, namely, the right of confrontation and cross examination, and that the confession of the petitioner was coerced after his right to counsel was denied and was inadmissible, but to no avail.

Argument

The probative force given to testimony by the trier of the facts should depend upon the testing of such testimony by confrontation and cross examination.

> "In almost every setting where important decisions turn on questions of fact, due process required an opportunity to confront and cross examine adverse witnesses." (*Goldberg* v. *Kelly*, 397 U.S. 254, 269)

Goldberg also cites a portion of *Greene* v. *McElroy*, 360 U.S. 474, 496-497:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence, consists *of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.* We have formalized these protections in the requirements of confrontation and cross examination. They have ancient roots. They find expression in the Sixth Amendment . . . This Court has

been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer* v. *Texas*, 380 U.S. 400, 405) (Emphasis supplied)

The latter case also stands for the proposition that if the right of confrontation and cross examination is circumvented then the testimony should be suppressed (*Pointer* v. *Texas*, *supra*, pp. 407, 408; see also *Davis* v. *Alaska*, 415 U.S. 308, 320).

In the proceeding below, the hearsay testimony of the only accusor against the petitioner was in fact used against him. The recanted testimony of this accusor was never heard or much less considered by the trier of the facts. She never testified!

In the proceeding below, the witness was never shown to be actually unavailable and hence the party relying on her testimony had the absolute duty to make her available as a witness (*Barber* v. *Page*, 390 U.S. 719, 725).

It is the mandated duty of the Police Department (pursuant to Section 8-22.0, subdivision 10, of the Nassau County Administrative Code, *supra*) to enforce all statutes and ordinances, and under the facts and circumstances in the proceeding below, the petitioner's superior officers had the absolute obligation and duty, if they were to believe the

allegations of the scorned woman, to prosecute the petitioner for the crime of adultery under Section 255.17 of the Penal Law of the State of New York (*supra*). The petitioner at his interrogation concerning this woman's allegations requested to be represented by counsel. It is respectfully submitted that under these circumstances that the petitioner was entitled to counsel (cf. re *Groban*, 352 U.S. 330, 337 and the dissent of Mr. Justice Black), and the warnings required by *Miranda* should have been afforded to him.

> "The petitioner had become the accused and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (*Escobedo* v. *Illinois*, 378 U.S. 478, 484.)

The petitioner was placed between the "rock" and the "whirlpool" and as an experienced police officer he had every reason to believe that his superiors were investigating the crime of adultery and that they would follow their mandated statutory duties with reference to the enforcement of this penal statute or any other statute within their jurisdiction.

> "The threat of criminal prosecution was apparent . . . from the nature of the proceeding . . ." (*Lefkowitz* v. *Turley*, 414 U.S. 70, 82, footnote 2).

The petitioner did not refuse "to answer questions specifically, directly and narrowly relating to the performance of his official duties . . ." (*Gardner* v. *Broderick*, 392 U.S. 273, 278). To the contrary, the petitioner answered all of the questions which related to the performance of his official duties, but he initially refused until threatened to answer questions which were not related to his duties, but were related to his personal and private affairs (pages 7, 9-10 of the statement portion of this petition). Notwithstanding these protestations of the petitioner who was

denied counsel, the petitioner was informed by a very high ranking superior officer "Do you hear me Grippe, you write a full statement and answer every fucking question asked of you or you will be suspended as sure as I am standing here" (page 8 of the statement portion of this petition).

> "At the same time, petitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights." (*Sanitation Men Assoc.* v. *Commissioner*, 392 U.S. 280, 285).
>
> "That answers *elicited upon the threat of the loss of employment are compelled and inadmissible in evidence.*" (*Lefkowitz* v. *Turley, supra*, p. 85) (Emphasis supplied)

Pursuant to the New York State Penal Law and the Nassau County Administrative Code, *supra*, it is conceded that the police department had a statutory obligation to investigate a complaint of a possible violation of the Penal Law. But when they took it upon themselves to unilaterally abandon their statutory duty to prosecute criminally, they circumvented the New York Criminal Procedure Law, because only the District Attorney or a Grand Jury may legally decide not to prosecute criminally. Thus, when the police department decided to treat the matter administratively, the deprivation of constitutional rights began to occur. The unavailability of the alleged complainant, the introduction of hearsay evidence, and the total disregard of the petitioner's constitutional rights, ushered in a situation where a travesty of justice was perpetrated and which was an out and out invasion of the petitioner's privacy.

In light of *Gardner* v. *Broderick*, the petitioner's constitutional rights attached when the high ranking police officials no longer asked the petitioner to answer questions that related to his official duties, but those relating to his private and personal life. It must be repeated, that the petitioner answered freely all questions relating to his official duties, but refused to answer personal questions that had no relationship whatsoever to his police duties. Only after the petitioner was threatened with loss of employment, did he reluctantly answer questions which were clearly beyond the scope of his employer's inquiry.

The police department arbitrarily and capriciously invaded the privacy of the petitioner. It did so under the guise of allegedly investigating a civilian complaint, but as cross-examination brought out there was no civilian complaint. The alleged complainant withdrew her complaint, recanted, stated that she lied, and confessed that the only reason she made the complaint was out of anger, jealousy, vindictiveness and malice. It was not until after the complaint was withdrawn that Chief Redican, a high ranking member of the police department, embarked on his witch hunt or investigation with the sole purpose to get Sergeant Grippe. With the zeal of a detective on a hot lead investigating a notorious criminal, Chief Redican's odyssey covered hundreds of miles, at great expense of the taxpayers of Nassau County. And for what? To invade the private life of the petitioner, to gather tainted evidence, to peek into the privacy of the bedroom, an area far beyond the scope for alleged departmental investigation. And why?

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts,

> their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." (*Olmstead* v. *United States*, 277 U.S. 438, 478 (1928), Brandeis, J., dissenting). (Emphasis supplied)

This Court has held that the right of privacy means right of the *individual*, married or single, to be free from unwarranted governmental intrusion into the bedroom (*Eisenstadt* v. *Baird*, 405 U.S. 438).

Mr. Justice Douglas quoting Chafee's *Three Human Rights in the Constitution of 1787:*

> "Our nation," wrote Chafee, "has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." (*Kent* v. *Dulles*, 357 U.S. 116, 126)
>
> "There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." (*Roe* v. *Wade*, 410 U.S. 113, 213, 214) Mr. Justice Douglas concurring.

The police department's administrative tribunal lacked jurisdiction in the case at bar, because the conduct alleged did not take place while the petitioner was on duty, nor did it bare any relationship to his official duties.

> "We have accordingly decided that since petitioner's crimes were not service connected, he could not be tried by court-martial but rather was entitled to trial by the civilian courts." (*O'Callahan* v. *Parker*, 395 U.S. 258, 274)
>
> "We have concluded that the crime to be under mili-

tary jurisdiction must be service connected, . . ." (*O'Callahan* v. *Parker, supra,* at 272)

Since the conduct alleged by the police department occurred while the petitioner was off duty, in private, and was not related to his work as a police officer, the conduct, if criminal, should have been referred to a court of law.

> "That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." (*O'Callahan* v. *Parker, supra,* at 265)

> "A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." (*O'Callahan* v. *Parker, supra,* at 266)

In *Gosa* v. *Mayden,* 413 U.S. 665 the Court affirmed the holding in the *O'Callahan* case making it prospective in application. The hearing in the case at Bar occurred after the Court rendered its decision in *Gosa* v. *Mayden.*

Although the police department is not a military organization nor does it compare, quasi or otherwise, with the military or a militia, its administrative tribunal acted as if it were a court-martial. It is for this reason, the petitioner requests the Court to apply the foregoing decisions to the case at Bar.

"Conduct unbecoming an officer;" "disorder or neglect of good order, efficiency or discipline;" "prejudicial to the good order and efficiency of the police department"—

What do these phrases mean? They tend to explain some type of conduct. But what conduct? These vague and ambiguous phrases can be found in the Rules and Regulations of the Police Department, County of Nassau, New York, and in the charges and specifications against the petitioner. They have been carefully worded so as to state very little, mean so much, and defy comprehension. They are used as a "catch-all", a method of *ex post facto* prohibition readily available for use in all situations.

> As many decisions of this Court make clear, vague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due proces of law." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. As the Court put the matter in *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U.S. 174, 176. Secondly, vague statutes offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 165-171. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . . *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109. The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure. *Parker* v. *Levy*, 417 U.S. 733, 774-775 (Mr. Justice Stewart, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting).

> . . . Men of common intelligence—including judges of both military and civil courts—must necessarily speculate as to what such terms as "conduct unbecoming an officer and a gentleman" and "conduct of a nature to bring discredit upon the armed forces" really mean. In the past, this Court has held unconstitutional statutes penalizing "misconduct," conduct that was "annoying", "reprehensible", or "prejudicial to the best interests" . . . In short, the general articles are in practice as well as theory *"catch-all" designed to allow prosecutions for practically any conduct that may offend the sensibilities of a military commander* . . . *Parker* v. *Levy, supra*, at 776, 779. (Mr. Justice Stewart, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting) (Emphasis supplied)

This Court has been extremely loath to disregard the rights of the citizenry regardless of their station in life. The determination of the State courts below that no constitutional issues were involved in this proceeding, or if they were of meager significance disregards and belies the very dignity of *"The Supreme Law of the Land"* which has been clearly, definitively announced and preserved by the decisional law of this Court which it is respectfully submitted, is completely contrary to (and flies in the face of) the attitude, the refusal, and the implied determination of the Court of Appeals of the State of New York with reference to the proceedings at bar.

The flagrant disregard of the petitioner's constitutional protections by the "Gestapo styled inquisition" of these so-called guardians of the public, cries out for correction by the highest Court in our nation, when the States permit such a travesty of justice to be protected from the light of justice and fair play.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix "A"

The Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States

AMENDMENT 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT 4:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT 5:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Appendix "A"

AMENDMENT 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

AMENDMENT 14, section 1:

(Adopted July 28, 1868)

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE 1, section 6

Constitution of the State of New York (as amended and in force January 1, 1969):

> "(Grand Jury; protection of certain enumerated rights; waiver of immunity by public officers required.) —No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, of which this state may keep with the consent of congress in time

of peace, and in cases of petit larceny, under the regulation of the legislature), unless an indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and *with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him.* No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case *to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify,* or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law." (Emphasis supplied)

Section 255.17 of the Penal Law of the State of New York:

Appendix "A"

Sec. 255.17 Adultery

"A person is guilty of adultery when he engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse."

Adultery is a class B misdemeanor. Added by L. 1965 ch. 1073, eff. September 1, 1967 (Gilbert Criminal Law and Procedure 1974 edition)

Section 8-13.0 of the Nassau County Administrative Code:

"Discipline and punishment. a. The commissioner shall have power to discipline a member of the force by:

1. Reprimand;
2. Fine;
3. Suspension, with or without pay;
4. Dismissal or removal from the force; or
5. Reducing him to any grade below that in which he was serving, if he be above the grade of patrolman, after which his compensation shall be the same as that allowed to members of the grade to which he is reduced.

b. Such members shall be disciplined for the following reasons only:

1. Conviction for any criminal offense;
2. Neglect of duty;
3. Violation of rules;
4. Neglect or disobedience of order;
5. Incapacity;
6. Absence without leave;
7. Conduct injurious to the public peace or welfare;
8. Immoral conduct;
9. Conduct unbecoming an officer; or
10. Any other breach of discipline.

Appendix "A"

The commissioner may designate a captain to conduct hearings on charges against lieutenants, sergeants, and patrolmen and to report his findings and recommendations to the commissioner for action thereon. In case of disciplinary action by fine, not more than thirty days' pay shall be forfeited and withheld for any offense."

Section 8-22.0 of the Nassau County Administrative Code sec. 8-22.0 Duties of police department. It shall be the duty of the police department within the boundaries of the police district to:

. . .

"10. Enforce and prevent the violation of all laws and ordinances in force in such district; and for these purposes with or without warrant, to arrest all persons guilty of violating any law or ordinance for the suppression or punishment of crime and offenses."

(Nassau County Administrative Code Laws 1939, Chapter 272)

Rules and Regulations of the Office of Commissioner of Police, Police Department, County of Nassau, New York.

ARTICLE IX

Rules 8, 9, 10 and 11:

"Rule 8: *Departmental Procedure at Trial*

The accused shall be called.
The accused shall plead 'Guilty' or 'Not Guilty' to each specification.

The witnesses for the Department shall next be introduced in the order directed by the Trial Commissioner. Before testifying, the witness shall be sworn

by the Trial Commissioner. The Department shall conduct the direct examination, at the conclusion of the direct examination, the witness shall be at the disposition of the accused for cross examination at the conclusion of the cross examination, the witness is subject to re-direct examination, followed by re-cross by the accused. After the witnesses for the Department have testified, the fact shall be communicated to the accused, and he shall then be permitted to proceed with his defense.

Each witness for the accused shall be sworn and his identity established, after which he shall be at the disposition of the accused. Following the direct examination by the accused, a witness is subject to cross-examination by the Department after which opportunity shall be given for re-direct followed by re-cross by the Department.

At the conclusion of the testimony offered by the witnesses for the accused, witnesses may be called by the Department in rebuttal. They are subject to cross-examination.

The accused shall then have an opportunity to introduce such other testimony as is competent and material, that he may desire.

The accused shall be given an opportunity to testify under oath in his own behalf, and be subject to cross-examination by the Department.

The accused and the Department shall be given a brief opportunity to sum up, or make pertinent motions.

The Trial Commissioner may, in his discretion, exclude from the trial room every person except the accused, his counsel, the prosecutor and counsel, the County Attorney, court clerk and stenographer.

Departure from any Departmental trial procedures shall not invalidate such proceedings unless it be con-

clusively shown in writing, addressed and delivered to the Commissioner of Police, within twenty-four (24) hours after completion of the Department trial, that such departure adversely or injuriously affected the rights of the accused."

Rule 9:

"Rule 9. *Suspension*

Members of the Department may be suspended from duty whenever in the opinion of the Commissioner of Police such action is necessary.

1. Unless otherwise directed by the Commissioner of Police a member of the Department under suspension, shall report daily, in person, to his Commanding Officer at the office of his Command, or as otherwise directed by the Commissioner of Police; if above the rank of Lieutenant, he shall report, in person, daily to the Chief of Headquarters, Chief of Detectives or Chief of District.

2. Upon suspension, a member of the Department shall promptly surrender all departmental property, also his service revolver and any and all other revolvers and pistols possessed by him, which property shall be invoiced to the Property Bureau, and returned to the member when relieved from suspension.

3. During the period of suspension, a member of the Force shall not wear his uniform, nor any distinguishable part thereof, nor carry any police equipment.

4. When a member is suspended from the Department without pay, he may engage in another lawful business or calling during the period of suspension."

Appendix "A"

Rule 10:

"Rule 10. A member of the Department found guilty of violating a rule or regulation of the Department, or of the provisions of any order or orders, or of disobedience of orders, or of cowardice, or of intoxication while on duty, or while in uniform, or *of conduct unbecoming an officer,* or *of making a false official communication, record or statement,* or a member of the Department convicted in a court having criminal jurisdiction, may be dismissed from the Department, or suffer such other punishment as the Commissioner of Police may direct."

Rule 11:

"Rule 11. Disorder or neglect of good order, efficiency or discipline, though not specifically mentioned in these Rules and Regulations, shall be taken cognizance of by the Department, and members of the Department found guilty thereof will be punished, at the discretion of the Commissioner of Police." (Emphasis supplied)

Appendix "B"

POLICE DEPARTMENT
COUNTY OF NASSAU, N. Y.

Charges and Specifications

Mineola, N. Y., ..., 19...

To the Commissioner of Police:

I hereby charge Sergeant GRIPPE, Daniel A., 102, First Precinct with: VIOLATING (1) ARTICLE IX, RULES 10 AND 11; (2) ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

SPECIFICATIONS:

in that 1. On information and belief, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, did for approximately five years, between October 1968 and September 1973, act in a manner unbecoming an officer which was prejudicial to the good order and efficiency of the police department in that, he did carry on an intimate and illicit relationship with a female other than his wife.

2. On information and belief, Sergeant Daniel A. Grippe, Shield Number 102, First Precinct, did, at, on or about 1600 hours on September 12, 1973, make a false communication in that, he did write in a report that "Sergeant Grippe is being compelled to write this report against his will with the threat of losing his job and position as a member of the Nassau County Police Department."

Complainant VINCENT J. REDICAN
Vincent J. Redican
Deputy Chief Inspector
Commanding Officer
First Division

Appendix "B"

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

VINCENT J. REDICAN, being duly sworn, deposes and says; that he is a Deputy Chief Inspector and Commanding Officer of the First Division, and the complainant herein. That he has read the foregoing charges and specifications and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true. That the sources of deponent's information are the books and records kept by the Police Department and the investigation made by the Police Department, County of Nassau, New York.

(Sworn to by Vincent J. Redican, September 13, 1973.)

Appendix "C"

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 15, 1974.

HON. JAMES D. HOPKINS

Acting Presiding Justice

HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER

Associate Justices

ORDER CONFIRMING DETERMINATION.

In the Matter of DANIEL A. GRIPPE,

Petitioner,

v.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

The above named Daniel A. Grippe, petitioner, having instituted this proceeding pursuant to article 78 of the CPLR by a petition verified November 3, 1973, to review a determination of the respondent, dated October 22, 1973; respondent having filed an answer thereto; by order of the Supreme Court, Nassau County, dated December 12, 1973, the proceeding was transferred to this court for determination; and the proceeding having been submitted by James R. Moffat, Esq., of counsel for the petitioner and

submitted by Ronald J. Morelli, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the proceeding is hereby dismissed on the merits and determination of respondent, dated October 22, 1973, confirmed, without costs.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

Appendix "D"

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of February A.D. 1975.

Present, HON. CHARLES D. BREITEL, Chief judge presiding.

2 Mo. No. 20

In the Matter of

DANIEL A. GRIPPE,

Appellant,

vs.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

An application for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said application be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk.

Appendix "D"

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of February A.D. 1975.

Present, HON. CHARLES D. BREITEL, Chief judge presiding.

2 Mo. No. 20

In the Matter of

DANIEL A. GRIPPE,

Appellant,

vs.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

JOSEPH W. BELLACOSA,
Clerk.

Appendix "D"

STATE OF NEW YORK,

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of June A.D. 1975.

Present, HON. CHARLES D. BREITEL, Chief judge, presiding.

2 Mo. No. 443

In the Matter of

DANIEL A. GRIPPE,

Appellant,

vs.

LOUIS J. FRANK, Commissioner of Police of the County of Nassau,

Respondent.

A motion having heretofore been made upon the part of the appellant in the above cause to this Court for reargument of motion to dismiss the appeal taken as of right, and for reargument of motion for leave to appeal, papers having been duly submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA,
Clerk of the Court.

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
OCT 9 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-376

DANIEL A. GRIPPE,

Petitioner,

V.

LOUIS J. FRANK,

COMMISSIONER OF POLICE, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Page

Opinion Below (There were no opinions delivered in the Courts below) 1

Jurisdiction 1

Questions Presented 2

Statement of Facts 3

POINT I—The failure of Hester I. Jerome to testify at the disciplinary hearing should not require reversal in that no substantial constituional question is directly involved 5

POINT II—Petitioner had no right to be represented by counsel during the course of an investigation by Police Commissioner of Nassau County 9

POINT III—Petitioner, formerly a police officer in the Nassau County Police Department, may properly be made to account for his actions 12

POINT IV—The Rules and Regulations of the Nassau County Police Department are not vague or ambiguous, and do not fail to indicate proscribed conduct so as to violate the due process clause of the Fourteenth Amendment to the United States Constitution 15

Conclusion—The petition for a writ of certiorari should be denied 18

TABLE OF CASES

Page

Anonymous Nos. 6 and 7 v. *Baker*
360 U.S. 287, 3 L. Ed.2d 1234,
79 S. Ct. 1157 (1959) 10

Application of Delehanty 202 Misc. 22, aff'd, 280 App.
542, 304 N.Y. 725 (1952) 11

Bachorik v. *Allied Control Co.*
34 A.D.2d 940, 312 N.Y.S.2d 272,
(1st Dept. 1970) 13,14

Bowles v. *Baer*, 142 F.2d 787 (7th Cir. 1944) 9

Cacchioli v. *Hoberman*, 31 N.Y.2d 287,
338 N.Y.S.2d 865 (1972) 13

Coates v. *City of Cincinnati*
402 U.S. 611, 614, 91 S. Ct. 1686, 1688,
29 L.Ed. 2d 214 (1971) 16

Confederation of Police v. *Conlisk*
489 F.2d 891 (7th Cir. 1973) 13

Connally v. *General Construction Co.*
269 U.S. 385, 391, 46 S. Ct. 126, 127,
70 L.Ed. 322 (1926) 15

Fletcher v. *United States*, 28 Ct. Cl. 173 (1893) 12

Gardner v. *Broderick*, 392 U.S. 273 (1968) 12

Gardner v. *Board of Public Works*
341 U.S. 716 (1950) 12

Garrity v. *New Jersey*, 385 U.S. 493 (1967) 12

Grayned v. *City of Rockford*,
408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298,
2299, 33 L.Ed. 2d 222 (1972) 15

Greene v. *McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959) 6

Grippe v. *Frank*, 46 A.D.2d 848, 362 N.Y.S. 1010 (1974) aff'd 36 N.Y.2d 713 (1975) 1

Kalkines v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973) 13

Kirby v. *Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972) 9,11

Kraus & Bros. v. *United States*, 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894 (1946) 15

Madera v. *Board of Education of the City of New York*, 386 F.2d 778 (2d Cir. 1967) 10

Matter of Hecht v. *Monaghan*, 307 N.Y. 461 (1954) 8

Matter of Marri, 57 Misc.2d 793 (1966) 17,18

McCune v. *Frank*, Court of Appeals for Second Circuit, #75-7027, (1975), motion for stay denied by Honorable Thurgood Marshall, Justice of the United States Supreme Court, 9/15/75 7

Miranda v. *Arizona*, 384 U.S. 436 11

Nason v. *Immigration and Naturalization Service*, 370 F.2d 856 (2d Cir. 1967) 10

Parker v. *Levy*, 417 U.S. 733, 41 L.Ed. 2d 439, 94 S.Ct. 2547 (1974) 16,17

Re Groban, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957) 9

Uniformed Sanitation Mens Assoc. v. *Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968) 12

United States Civil Service Commission v. *National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 28180, 37 L.Ed.2d 796 (1973) 16,17

United States v. *Neves*, 269 F. Supp. 158 (S.D. N.Y. 1967) 10

Younger v. *Harris*, 401 U.S. 37 (1971) 7

Younger, Samuels v. *Mackell* 401 U.S. 66 (1971) 7

Wasson v. *Trowbridge*, 382 F.2d 807, (2d Cir. 1967) 10

Winters v. *New York*, 333 U.S. 507, 523, 68 S.Ct. 665, 674, 92 L.Ed. 840 (1948) 15

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-376

DANIEL A. GRIPPE,

Petitioner,

V.

LOUIS J. FRANK,
COMMISSIONER OF POLICE, POLICE DEPARTMENT,
COUNTY OF NASSAU, NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The citation of the New York State Court of Appeals is reported at 36 N.Y. 2d 713 (1975), which cited 46 A.D. 2d 848, (362 N.Y.S. 2d 1010 (2nd Dept. 1974)). The subsequent motion of petitioner for reargument of the motion to dismiss the appeal taken as of right, and for reargument of motion for leave to appeal denied by the Court of Appeals by order dated June 16, 1975 as yet unreported, is found in petitioner's petition at page 15 a entitled Appendix "D".

Jurisdiction

The orders of the New York State Court of Appeals were entered in two separate orders entered February 12, 1975 petitioner's petition 14 a, and the subsequent order

entered June 16, 1975, petitioner's petition 15 a. The petition for writ of certiorari was filed on September 9, 1975. The jurisdiction of this Court is invoked under Rule 19(a) of said Court.

Questions Presented

1. Whether the petitioner had no opportunity to confront his only accuser?

Whether hearsay evidence may be admitted in a disciplinary proceeding?

3. Whether petitioner is required to be represented by counsel at the investigatory stage of a Police Department internal investigation which subsequently develops into a desciplinary proceeding?

4. Whether a report from a police officer to his superior officer was violative of his right to privacy concerning a matter under investigation relating to said police officer?

5. Whether the enforcement Rules & Regulations of the Nassau County Rules & Regulations are vague and ambiguous?

6. Whether a police officer's extramarital relationships are a proper subject for a police disciplinary proceeding?

7. Whether petitioner has presented a substantial constitutional question which is directly involved in his appeal?

Statement of Facts

On September 4, 1973, Daniel A. Grippe (hereinafter petitioner or petitioner Grippe), a sergeant in the Nassau County Police Department, went to see his commanding officer, Inspector DeBeche, Commander of the First Precinct. In the conversation that followed, petitioner Grippe revealed that he had been involved in an extramarital affair for "...the last couple of years..." (R. 184).* Approximately one-half hour after this conversation, the woman with whom petitioner Grippe was involved, a Mrs. Hester Jerome, arrived at the office of Inspector DeBeche. Mrs. Jerome proceeded to explain her illicit relationship with the petitioner (R. 186). Both petitioner and Mrs. Jerome freely volunteered information relating to their affair to Inspector DeBeche.

As a result of the two aforementioned conversations on September 4, 1973 in which both petitioner and his paramour revealed their illicit affair to Inspector DeBeche, and one further conversation on September 5, 1973 in which Mrs. Jerome recounted to Chief Redican, Commanding Officer of the First Division, her relationship with petitioner, Chief Redican was placed in charge of an internal investigation with regard to the alleged conduct of Petitioner. Chief Redican's investigation substantiated the substance of the conversations of September 4th and 5th. The investigation turned up motel registration stubs revealing that petitioner and Mrs. Jerome shared a motel room during a P.B.A. convention, that she accompanied him to Boston in April of 1972 for a sociology convention, and that they took a trip together to Kentucky in August, 1973 to visit Mrs. Jerome's family. (County Exhibits 5A-J, 6A-J, 9, 10 and 11 of the Record).

As part of the investigation, Petitioner Grippe was called to the office of the Chief of District on September

(*R. – Record on Appeal unless otherwise indicated.)

12, 1973. Pursuant to Section 6(b) of the contract between the County of Nassau and the P.B.A., Petitioner had a P.B.A. representative present during his interview. This representative was P.B.A. President, Cliff Schmidt. During the interview, petitioner gave a full and complete report of his relationship with Mrs. Jerome. In his report, petitioner falsely stated that he was being compelled to write the report under threat of losing his job. Petitioner made this statement in spite of the fact that the Nassau County Administrative Code makes clear that only the Commissioner of Police can dismiss an officer, and only after there has been a disciplinary proceeding. At the conclusion of the interview, P.B.A. President Schmidt was asked if there was anything improper during the interview, or if at any time petitioner was threatened with the loss of his job. President Schmidt stated that there was nothing improper in the interview, and that there were no threats, with the exception of a statement to Petitioner that he could be properly suspended, if he didn't write his report. (R. 130-136)

On September 13, 1973, petitioner was served with charges and specifications stating he violated Article IX, Rules 10 and 11, of the Rules and Regulations of the Police Department. The Specifications stated that petitioner (1) acted in a manner unbecoming an officer by carrying on an intimate and illicit relationship with a female other than his wife, and (2) that Petitioner made a false communication in his report when he stated he was being compelled to write the report under threat of losing his job (R. 13a-14a).

From October 2, 1973 to October 5, 1973, a disciplinary hearing was conducted at Nassau County Police Headquarters. Upon the recommendation of the trial commissioner, and after his own study of the case, the Commissioner of Police, Louis J. Frank (hereinafter respondent or respondent Frank) found petitioner guilty of the charges and specifications and ordered him dismissed from the Police Department. It should be pointed out that respondent, in his decision, mentioned petitioner's prior

disciplinary involvement. (R. 17a) On February 7, 1973, Petitioner had been found guilty of, among other charges, making sexual proposals to a 17 year old female, and permitting a female private person to enter a Department vehicle without being so directed, and not on official police business. (R 32a-33a, 36a-38a)

A proceeding was commenced in New York State Supreme Court, Nassau County on November 19, 1973 by the service of a Notice of Petition and Verified Petition with an Answer being served on January 28, 1974. The petitioner requested Article 78 Review of respondent's determination dismissing him. The proceeding was duly transferred to the Appellate Division, Second Department, which affirmed the determination of the Trial Commissioner and the decision of Commissioner Frank. (46 A.D.2d 848, 1974). Motion for leave to appeal was denied by the Court of Appeals (36 N.Y.2d 713, 1975), as was the motion of petitioner for reargument (order dated June 15, 1975 and as yet unreported.)

On September 9, 1975, petitioner filed an application to this Court for a writ of certiorari to review the within proceedings.

POINT I

The failure of Hester I. Jerome to testify at the disciplinary hearing should not require reversal in that no substantial constitutional question is directly involved.

Petitioner contends in page 1 of his petition for a writ of certiorari that "the petitioner had no opportunity to confront his only accuser...". Of course this is not the case, because Hester I. Jerome is not the accuser in the case at bar. In this disciplinary proceeding, the accuser or complainant was Vincent J. Redican, Deputy Chief Inspector of the Nassau County Police Department (see page 9A, 10A Appendix "B").

It is clear from a reading of the record that Daniel A. Grippe's report, as well as other evidence uncovered by the Police Department, resulted in his being found guilty of breach of disciplinary rules and regulations. In essence, petitioner's own report and testimony alone were sufficient to establish guilt. It is no longer conjecture as to whether Mrs. Jerome's testimony was necessary to the respondent's case, because of the insurmountable evidence against petitioner in the record.

The case of *Greene* v. *Mc Elroy*, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400, (1959), which petitioner cites, is distinguishable in that petitioner herein could readily confront and question the Nassau County Police Investigators who took Mrs. Jerome's statement. Reports relevant to the disciplinary hearing were readily available to petitioner. The most glaring and distinguishing characteristic in the instant case as compared to the Greene case, is that petitioner's own report and statements as well as other relevant and material evidence bearing on his conduct and activities ultimately resulted in finding him guilty with respect to the charges made against him.

In any event, petitioner's attorney could have taken steps to properly protect his client in the event petitioner's attorney determined that petitioner required Mrs. Jerome as necessary to his case. This is especially true since counsel for the petitioner insisted that the County produce Mrs. Jerome for confrontation and cross-examination (R. 76). Senior Deputy County Attorney Louis Schultz stated that he was going to have this subpoenaed witness cited for contempt, upon the conclusion of this proceeding if not sooner, to punish Mrs. Jerome for contempt of court (R. 78). At this point in time, petitioner's attorney could have, but did not request the Trial Commissioner to take any additional or further steps to compel Mrs. Jerome's appearance pursuant to Section 2308(b) of the New York Civil Practice Law and Rules with respect to obedience of non-judicial subpoenas.

There were other possible remedies available to petitioner, if he thought it necessary, by instructing his attorney to move in the Supreme Court of the County of Nassau for a stay of all proceedings pending the presence and testimony of Mrs. Jerome, or for an order on good cause shown requiring the Police Commissioner of Nassau County to enforce the previously issued judicial subpoena by application to the Court, as provided in New York CPLR 2308(b), or in the extreme, for a writ of prohibition pursuant to Article 78 of the New York CPLR.

In addition, petitioner through his attorney could have gone to the federal courts to enjoin the pending county disciplinary proceedings, if he determined that extraordinary circumstances required it to protect his client's interests. See: *Younger* v. *Harris*, 401 U.S. 37 (1971), and the companion case of *Younger, Samuels* v. *Mackell*, 401 U.S. 66 (1971)

In *McCune* v. *Frank*, U.S. Court of Appeals for the Second Circuit, Docket #75-7027, (1975) and motion by McCune for stay denied by the Honorable Thurgood Marshall, Justice, United States Supreme Court, on September 15, 1975, the Circuit Court stated, at page 4882:

> "That we are dealing with a county police department's disciplinary proceeding rather than a state court action is of little moment. A proceeding in a state court is not a prerequisite to the applicability of *Younger*. *Schlesinger* v. *Councilman, supra; Geiger* v. *Jenkins*, 401 U.S. 985 (1971), *aff'g. mem.*, 316 F. Supp. 370 (N.D. Ga. 1970). *Geiger* establishes that *Younger* has relevance to administrative proceedings, *see Anonymous* v. *Association of the Bar, supra.* F.2d , at n. 3, slip op. 2715 at 2724-25 n.3, and the explanation of *Geiger* in *Gibson* v. *Berryhill*, 411 U.S. 564, 576-77 (1973), indicates that this applicability is subject to considerations similar to those subsequently enunciated in *Huffman, supra*, and *Anonymous* v. *Association of the Bar, supra.*"*

*The citations for the two companion Anonymous Cases and 515 F 2d 427, and 515 F 2d 435, (2d Circuit1975).

In summation, the petitioner pursued none of these adequate remedies at law to protect himself, and therefore it is fair to conclude that he was left to the State courts.

It should also be noted that in administrative hearings such as disciplinary hearings, hearsay testimony is admissible, provided other competent evidence is submitted. Such was the case in the instant proceedings. The following quotation from *Matter of Hecht* v. *Monaghan*, 307 N.Y. 461 (1954) on the informality and the disregarding of technical and legal rules of procedure is well stated.

> "The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal (see *Matter of Friedel* v. *Board of Regents*, 296 N.Y. 347, 352-353; *Matter of Heaney* v. *McGoldrick*, 286 N.Y. 38, 45; *People ex rel. Hirschberg* v. *Board of Supervisors*, 251 N.Y. 156, 172; *Matter of Greenebaum* v. *Bingham*, 201 N.Y. 343, 347; *Morgan* v. *United States*, 304 U.S. 1, 18-19; *West Ohio Gas Co.* v. *Commission* [*No. 1*], 294 U.S. 63, 70-71 *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 339-340; *Kwock Jan Fat* v. *White*,, 253 U.S. 454, 463-464; *Interstate Commerce Comm.* v. *Louisville & Nashville R.R.*, 227 U.S. 88, 93-94)."

It is submitted that no substantial constitutional question is directly involved, and the petition for a writ of certiorari should be dismissed.

POINT II

Petitioner had no right to be represented by counsel during the course of an investigation by the Police Commissioner of Nassau County.

The Sixth Amendment to the United States Constitution provides for the assistance of counsel to the accused in all criminal prosecutions, and is subject to the "criminal prosecution" limitation stated in said amendment, and as a result, has no bearing on the question whether there is a right to counsel in administrative proceedings.

It is established that there is no constitutional right to the assistance of counsel at the investigatory stage. *Bowles* v. *Baer*, 142 F.2d 787 (7th Cir. 1944). The Court in *Kirby* v. *Illinois* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) stated,:

> *"In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." at 32 L.Ed. 2d 417.*

It is clear in the case at bar a right to counsel at the investigatory stage is not authorized by any statute, regulation or specific constitutional provision. In the case of *Re Groban*, 352 U.S. 330, 1 L.Ed.2d 376, 77 S.Ct. 510 (1957), a right to counsel under the due process clause was denied to a witness at a state fire marshal's investigation into the cause of a fire, notwithstanding that the witness was under suspicion. The Supreme Court, in *Re Groban*, concluded that the fact that witnesses at the investigation were under a legal duty to speak, and that their testimony might provide a basis for criminal charges against them, did not

mean that they had a constitutional right to the assistance of counsel; such witnesses, it was pointed out, have the protection of the privilege against self-incrimination and, until evidence obtained in such investigation gives rise to a criminal charge, only the self-incrimination privilege is available.

This rule also finds support in cases involving preliminary examinations in deportation proceedings, *Nason* v. *Immigration and Naturalization Service*, 370 F.2d 856 (2d Cir. 1967), as well as other investigations preliminary in nature. *Anonymous Nos. 6 and 7* v. *Baker*, 360 U.S. 287, 3 L.Ed. 2d 1234, 79 S.Ct. 1157 (1959). See also *Wasson* v. *Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Madera* v. *Board of Education of the City of New York*, 386 F. 2d 778 (2d Cir. 1967); *United States* v. *Neves*, 269 F.Supp. 158 (S.D.N.Y. 1967).

It therefore appears that petitioner's brief attempts to apply the right to counsel requirements at the hearing stage to the investigation stage. It is submitted that reliance upon those cases which require a right to counsel at a hearing is misplaced in that they do not apply at the investigatory stage of the proceedings. (Particularly here where there was no charge of a crime having been committed).

It is also clear that there is a distinction between an "investigation" and a "hearing" or "adjudication." A provision for "investigation" ordinarily is not a requirement of a "hearing" and constitutional rights in adjudicatory proceedings are inapplicable to the police investigation in the case at bar, because a one-sided investigation does not constitute a hearing. 2 Am.Jur.2d, Administrative Law, §414. The term "hearing" is appropriate to quasi-judicial proceedings, while "investigation" is appropriately used with regard to non-judicial functions of the administrative agency. It is therefore clear that "investigation" is non-adversary and contemplates procedure less formal and more flexible than applies to an administrative hearing.

Petitioner's contention that he was denied his right to counsel during his interview concerning allegations made against him is without merit during an investigatory non-adversary interview on a non-criminal matter. It is also clear that a subsequent disciplinary trial of a police officer is not a criminal proceeding, and the penalties involved would at most result in fines or dismissal from the police force. *Application of Delehanty*, 202 Misc. 22, *aff'd*, 280 App.Div. 542, *aff'd*, 304 N.Y. 725 (1952). Since the disciplinary matter is essentially civil in nature, and since the fruits of the disciplinary interrogation cannot be used in any subsequent criminal action, the rules applicable to having counsel present in criminal actions do not apply at the investigatory stage. There was no criminal charge contemplated or in fact made in this matter.

It should also be noted that petitioner's reliance upon *Miranda* v. *Arizona* 384 U.S. 436 is misplaced. The Court in *Kirby* v. *Illinois cited supra* stated:

> "It follows that the doctrine of *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 ALR 3d 974, has no applicability whatever to the issue before us; for the Miranda decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theroy that custodial *interrogation* is inherently coercive." at 37 L.Ed.2d 416, 417.

In any event the thrust of petitioner's case citations evolve around criminal actions and not administrative disciplinary proceedings.

POINT III

Petitioner, formerly a police officer in the Nassau County Police Department, may properly be made to account for his actions.

The law is clear that a municipal employer has a right to make inquiries of its emloyees as to matters effecting their fitness and suitability for public service, *Gardner* v. *Board of Public Works*, 341 U.S. 716 (1950). Additionally, petitioner's activities, whether on duty or off duty, are a legitimate subject for a disciplinary inquiry concerning a charge of conduct unbecoming an officer. *Parker* v. *Levy*, 417 U.S. 733, 41 L.Ed.2d 439, 94 S.Ct. 2547 (1974); *Fletcher* v. *United States*, 28 Ct. Cl. 173 (1893). In this regard, it should also be pointed out that §8-13.0 of the Nassau County Administrative Code provides that the Commissioner of Police shall have the power to discipline an officer guilty of immoral conduct.

Petitioner alleges that his participation in the interview phase of the internal investigation was improper and unconstitutional. Yet petitioner concedes that the constitutional right to privacy and the right to exercise 5th Amendment rights do not apply to administrative proceedings. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). Petitioner also ignores the fact that the United States Supreme Court has stated that a police officer must cooperate, and answer questions put to him during an official investigation. *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Mens Assoc.* v. *Commissioner of Sanitation of the City of New York*, 392 280 (1968).

It is contended by petitioner that the statement he gave to Chief Redican during the interview should be suppressed because he was not given proper Miranda warnings and that he was forced to incriminate himself. Petitioner's contentions are illogical. Assuming, *arguendo*, petitioner was subject to some criminal liability for his acts, then any statement he gave without the proper Miranda

warnings could not be used against him in any subsequent criminal action. In fact, the law holds that any answers given by a public employee pursuant to a legitimate investigation of his actions cannot be used against him in any subsequent criminal case. *Garrity* v. *New Jersey, supra; Kalkines* v. *United States* 473 F. 2d 1391 (Ct. Cl. 1973); *Confederation of Police* v. *Conlisk*, 489 F.2d 891 (7th Cir. 1973).

Judge Jasen, of the New York Court of Appeals, in his concurring opinion in *Cacchioli* v. *Hoberman*, 31 N.Y.2d 287, 338 N.Y.S.2d 865 (1972), stated:

"It should be noted that a threat by an employer to do what the employer has the right to do does not constitute fraud or duress. (*Bachorik* v. *Allied Control Co.*, 34 A.D. 2d 940, 942.) Under analogous circumstances involving the involuntary resignation of a corporate officer, the Appellate Division has held: '[The officer's] testimony further demonstrates that the events surrounding his resignation did not contain the elements of wrongful conduct necessary to establish the claims of duress and undue influence. What plaintiff relies upon is the fact that he was told that he would be involuntarily discharged, without severance pay and that this might be disclosed to prospective employers. This can neither be considered a threat, nor false advice, since defendants had the right to discharge plaintiff, who was an employee at will, were not under any duty to continue his salary and were privileged to inform prospective employers of the circumstances surrounding the termination of his employment. A threat to do that which one has the legal right to do does not constitute duress or fraud.

(*Bachorik* v. *Allied Control Co.*, 34 A.D.2d, at p. 942)". 31 N.Y.2d at 291-2."

In addition, the language in *Bachorik* v. *Allied Control Co.*, 34 A.D.2d 940 312 N.Y.S. 2d 272, (1st Dept. 1970), is relevant in that it establishes the flaws and weaknesses in petitioner's "coerced confession" argument. The Court stated, in *Bachorik*:

> "His testimony further demonstrates that the events surrounding his resignation did not contain the elements of wrongful conduct necessary to establish the claims of duress and undue influence. What plaintiff relies upon is the fact that he was told that he would be involuntarily discharged, without severance pay and that this might be considered a threat, nor false advice, since defendants had the right to discharge plaintiff, who was an employee at will, were not under any duty to continue his salary and were privileged to inform prospective employers of the circumstances surrounding the termination of his employment. A threat to do that which one has the legal right to do does not constitute duress or fraud. (*Oleet* v. *Pennsylvania Exch. Bank*, 285 App. Div. 411.)" 34 A.D.2d at 942.

The petitioner was not deprived of any constitutional rights herein, inasmuch as what an employer had a right to do does not constitute coercion or duress, nor does it constitute any violation of his constitutional rights in the case at bar.

POINT IV

The Rules and Regulations of the Nassau County Police Department are not vague or ambiguous, and do not fail to indicate proscribed conduct so as to violate the due process clause of the Fourteenth Amendment to the United States Constitution.

A statute or rule which regulates human conduct is unconstitutional if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *Kraus & Bros.* v. *United States*, 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894 (1946).

The rationale for this rule was explained by Justice Frankfurter:

> "Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. The requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of "due process of law"." *Winters* v. *New York*, 333 U.S. 507 523, 68 S.Ct. 665, 674, 92 L.Ed. 840 (1948) (dissenting opinion).

In *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222 (1972), the Court stated:

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist

that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms', it 'operates to inhibit the exercise of [those] freedoms'. Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone"...than if the boundaries of the forbidden areas were clearly marked."

However, a court examining an allegedly vague statute must not restrict its focus to the words of the statute only. The Supreme Court also noted in *Grayned* that a state court's narrowing interpretation of a state statute may supply the required specificity. The Court expanded on this proposition and relied on it in *Parker* v. *Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), which upheld articles 133 and 134 of the Uniform Code of Military Justice, despite their unspecific language, because of the specific content given those provisions by years of judicial gloss supplied "by the United States Court of Military Appeals or by other military authorities". The Court went on to reject the respondent's void-for-vagueness claim on the ground that, because the Articles applied without question to *his* activities, he had no standing "to challenge the vagueness of these Articles as they might be hypothetically applied to the conduct of others." The Court noted that this was not a case involving vagueness "'in the sense that no standard of conduct is specified at all,'" quoting from and distinguishing *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971).*

* This, of course, does not mean that a person facing loss of a job does not have as strong a void-for-vagueness arguement as one facing criminal prosecution. *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

However, *Parker* v. *Levy, supra*, controls disposition of the vagueness challenge here. In the first instance, this is not a First Amendment case. In addition, the vagueness attack should be rejected because the policies underlying the vagueness doctrine do not require its application here, and the Rules and Regulations of the Nassau County Police Department at issue here are not so vague that it specifies no standard at all.

It is also clear that the wording of the aforesaid regulations in question are not so vague that men of common intelligence like petitioner do not know its meaning. As the Supreme Court stated, in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. at 575-577, 93 S.Ct. at 2897:

> "There might be quibbles about the meaning of [certain terms in the regulations,] but there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. '[T]he general class of offenses to which...[the provisions are] directed is plainly within [their] terms,...[and they] will not be struck down as vague, even though marginal cases coulld be put where doubts might arise.' *United States* v. *Harriss*, 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954)."

It is therefore submitted that petitioner's vagueness challenge should be rejected, inasmuch as his conduct and his actions were properly the subject of a disciplinary action. In the *Matter of Marri*, 57 Misc. 2d 793 (1968), the New York Court stated:

> "A police officer plays a unique role in society. He is the guardian of the public safety and is set up as a model

to be emulated. He must at all times be free to exercise his judgment in performing his duties and can never act in a manner which would tend to destroy the public's confidence in his integrity. *Not only his official conduct, but the manner in which he conducts himself while not on duty reflects upon his integrity and upon his ability to perform his duties.*" (Emphasis supplied.)

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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